91-1286

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., a New Mexico Corporation, and JENNIE DEDEN BEHLES, Trustee in Bankruptcy for Sangre de Cristo Development Company, Inc., *Petitioners*,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the failure of the Department of Interior, pursuant to Departmental policy, to comply with the National Environmental Policy Act (NEPA) before approving a long term lease of Indian land invalidates the approval of the lease *ab initio*, thus preventing private property rights from vesting in the lessee for purposes of the Takings Clause of the Fifth Amendment to the United States Constitution.

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v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit has been published and appears at 932 F.2d 891 (10th Cir. 1991). A copy of the Court's Opinion is printed as Appendix A to this Petition. The Memorandum Opinion and Order of the United States District Court for the District of New Mexico, Judge Harry Lee Hudspeth, sitting by designation, was not published. It is printed as Appendix B to this Petition.

JURISDICTION OF THIS COURT

The United States Court of Appeals for the Tenth Circuit entered judgment on May 7, 1991. A Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed. The Tenth Circuit Court of Appeals entered its Order denying the Petition for Rehearing on September 24, 1991. The Order is printed as Appendix C to this Petition.

This Court granted an extension of time until January 22, 1992, to Petitioner SANGRE DE CRISTO DEVELOPMENT COMPANY, INC. (hereafter "SANGRE"), within which to file its Petition for Writ of Certiorari. A copy of the Order is printed as Appendix D to this Petition.

This Court has jurisdiction to review the Judgment in question by Writ of Certiorari pursuant to 28 U.S.C. Section 1254. The applicability of the United States Constitutional protection of the Fifth Amendment against taking property without just compensation to a ninety-nine (99) year Lease of Indian lands approved by the Secretary of the Department of Interior has been called into question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States. The part at issue is the Takings Clause: ". . . nor shall private property be taken for public use without just compensation."

The following federal statutes are involved:

The National Environmental Policy Act, 42 U.S.C. §§ 4321, et seq. (Appendix E)

The Indian Nonintercourse Act, 25 U.S.C. § 177 (Appendix E)

The Pueblo Lands Act, Pub. L. 68-253, 43 Stat. 636, June 7, 1924

25 U.S.C. § 415 (Appendix E)

Act of December 18, 1980, Pub. L. 96-549, 95 Stat. 3219 (Appendix F)

STATEMENT OF THE CASE

On May 24, 1970, the Secretary of the United States Department of Interior, pursuant to authority delegated to the Commissioner of the Bureau of Indian Affairs (BIA), approved a ninety-nine (99) year Lease to Petitioner of lands owned by the Tesuque Pueblo, a federally recognized Indian Tribe. Approval of the lease by the Department of Interior was in full compliance and accord with all statutes and regulatory requirements internal and specific to the Department.

The Department of Interior approval followed a two-year course of negotiations in which the United States, through the BIA as trustee, controlled negotiations for the lease on behalf of the Tesuque Pueblo. Approval of the lease by the United States Department of Interior was required by the Indian Nonintercourse Act, 25 U.S.C. Section 177 and the provisions of 25 U.S.C. Section 415, as well as the requirements of the Pueblo Lands Act, Pub. L. 68-253, 43 Stat. 636, June 7, 1924. The Respondent United States and SANGRE entered into formal stipulations of fact prior to trial concerning the extent of the United States' trust responsibility and its participation and negotiation of the lease, as follows:

. . .

6. Pursuant to its trust responsibilities to Indian tribes, and the provisions of Section 17 of 43 Stat. 636 and of 25 U.S.C. 415, and 25 CFR § 162.1 et seq. (formerly part of 131 et seq.), the Defendant exercises authority and control over the alienation, administration and utilization of the lands of its ward, the Tesuque Pueblo.

7. The Pueblo of Tesuque does not, and at all times pertinent hereto, did not have the capacity and power to alienate, encumber, or lease any of its

> lands to nonmembers of the Pueblo without the express approval of the Defendant through the Department of Interior and the Bureau of Indian Affairs.
>
> 8. Pursuant to its general and statutory authority and power as trustee, the Defendant participated in the negotiation of, approved, and administered the lease (Exhibit "A" to Plaintiffs' Complaint) of a portion of the lands of the Tesuque Pueblo to Sangre. (Doc. 80) . . .

The National Environmental Policy Act (NEPA) was enacted in 1969 and took effect January 1, 1970. No Environmental Impact Statement (EIS) as contemplated by NEPA was prepared in connection with the Department of Interior's approval of the lease. The failure of the Department of Interior to perform or require an environmental review under NEPA was prompted by the Department's firm position that NEPA did not apply to its approval of leases of Indian lands. As part of the formal stipulations of fact referred to above, the United States also agreed as follows:

> . . .
>
> 14. Throughout the period of negotiation leading up to execution of the lease in 1970, and thereafter, the Defendant took the firm position that the NEPA was not applicable to the lease with Sangre, or to the development under consideration thereunder on the subject Pueblo Lands . . . (Doc. 80)

Upon approval of the lease, in May, 1970, SANGRE immediately took possession of and proceeded to develop the property. The United States stipulated before trial that under the terms of the lease, SANGRE was obligated to, and did obtain approvals from the Respondent United States, of all its plans and actions. In the course of the real estate development, SANGRE expended approximately 1.5 Million Dollars. Sales of residential lots com-

menced in May, 1971, and by the fall of 1972, approximately 200 residential lots had been sold.

In October, 1971, an action was filed against the Secretary of the Interior seeking to enjoin further development under the lease. SANGRE was not a party to the action. The trial court denied injunctive relief, holding that Departmental approval of Indian lands was not "major federal action" under NEPA. *Davis v. Morton*, 335 F.Supp. 1258 (D.C. N.M. 1971). On November 24, 1972, the United States Court of Appeals for the Tenth Circuit issued an opinion reversing the trial court and remanding for entry of injunctive relief. *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

The trial court entered an injunction on January 31, 1973. The injunction stopped all development work by SANGRE. After entry of the injunction, the Department of Interior, through the BIA, commenced work on an Environmental Impact Statement. A Final Environmental Impact Statement (FEIS) was not issued until August, 1977. Immediately after issuance of the FEIS, the Department of Interior issued its decision disapproving the lease in its entirety. Involuntary bankruptcy proceedings were filed against SANGRE in October, 1977.

On December 7, 1981, SANGRE filed suit in the United States District Court for the District of New Mexico pursuant to Section 3 of Pub. L. 96-549, 94 Stat. 3219. The matter was tried to the United States District Court in August, 1985. On August 3, 1989, the trial court entered its decision denying SANGRE all relief. With regard to SANGRE's Fifth Amendment claim, the trial court held that failure of the Department of Interior to comply with NEPA, pursuant to its own departmental policy, prevented any property rights from vesting in SANGRE.

Petitioner timely appealed to the Tenth Circuit Court of Appeals on September 29, 1989. Jurisdiction of the Tenth Circuit Court of Appeals was based on 28 U.S.C.

Section 1291. The Tenth Circuit Court of Appeals entered its Opinion on May 7, 1991, holding that the Department's failure to comply with NEPA invalidated the lease contract *ab initio*; that the lease had no legal effect; and, that the lease vested no property interest in SANGRE which could be protected by the Fifth Amendment.

REASON FOR GRANTING THE WRIT

The holding of the Tenth Circuit Court of Appeals gives unintended scope and effect to the procedural requirements of NEPA. NEPA was enacted to ensure that federal agencies consciously consider environmental issues when taking "major federal action". 42 U.S.C. § 4332(2)(C). NEPA was not meant to control the substance of agency decisions. NEPA does not mandate any particular result, it only requires that environmental issues be part of agency considerations and calculations. The Tenth Circuit's decision gives the NEPA process the most substantive effect possible. The Tenth Circuit Court decision essentially means that any noncompliance with NEPA voids agency action from the moment of noncompliance forward.

The potential impact of the Tenth Circuit rule is extremely broad. Every agency action not in full compliance with NEPA will be subject to challenge not only for injunctive relief to maintain the status quo and to impose additional NEPA review, but also for declaratory relief that the agency action is simply void and of no effect, regardless of what has actually occurred and what steps have been taken to effect the agency action. Litigation in the area will move away from enforcing the NEPA process to simply declaring agency actions a nullity and voiding all transactions connected with the agency decision.

The potential effect of the Tenth Circuit opinion would be most marked for the private sector. Parties dealing with the federal government would run the risk that if

NEPA is not fully complied with by the agency, then all arrangements between the government and the private contractor could be held void *ab initio*. Similarly, as here, all contracts requiring federal government approval of agency action could be held void from outset if the approving agency did not fully comply with NEPA. The opinion provides no room for consideration of actual events, commitments, expenditures of resources, or the reasonableness of the reliance by the contractor on agency action and policy. The Tenth Circuit opinion states an over broad rule of invalidity *ab initio* for all actions taken without full NEPA compliance.

In citing *Gray v. Johnson*, 395 F.2d 533 (10th Cir. 1968), as requiring a *valid* approval before any property rights can vest in a private party dealing with the federal government, the Tenth Circuit Court has taken the normally reasonable rule preventing application of the equitable doctrine of estoppel against the federal government to an illogical extreme. The Tenth Circuit opinion creates an unworkable situation for private parties dealing with government agencies: they cannot rely on the unauthorized acts or statements of individual employees, nor can they rely on fully authorized actions taken pursuant to Departmental policy if the Department has not fully complied with NEPA. The Tenth Circuit opinion holds that absent compliance with NEPA, no departmental approval is valid, and no rights pass to or vest in the party relying on the departmental approval.

The Tenth Circuit opinion is contrary in result and spirit to the opinions of this Court, to the opinions of other Circuit Courts of Appeal and to prior case law within the Tenth Circuit describing the proper role of NEPA in the federal agency decision making process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed. 2d 351 (1989). This case presents an opportunity for the Supreme Court to clarify the role of NEPA in agency decision making and to clarify the effect of non-compliance with NEPA on the

contract and property rights of private parties reasonably relying on departmental approvals which later prove to run afoul of NEPA.

ARGUMENT

NON-COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT DOES NOT, BY ITSELF, VOID AGENCY ACTIONS

Resolution of this case depends on determining the practical, real-life consequences of a federal agency's failure to comply with NEPA's environmental impact study requirement. With the exception of the case at bar, all cases studying the issue have described the impact of NEPA as purely "procedural". Even the Respondent United States will likely agree with this label. As with most labels, however, calling NEPA procedural does not help in deciding what happens, or what should happen, when NEPA procedures are not followed. The National Environmental Policy Act itself does not offer any specific guidance. There is no "drop-dead" provision in NEPA describing the consequences of non-compliance with the statute. The answer must be gleaned from the purpose of NEPA itself, the case law examining the nature of NEPA, and the practical effect of court rulings resolving challenges to agency action based on NEPA non-compliance. After this review, it will be clear that the Tenth Circuit stands alone in holding that NEPA non-compliance, by itself, voids or negates agency action.

In 42 U.S.C. Section 4321, Congress explained its purpose enacting NEPA to be the declaration of a policy which would "encourage productive and enjoyable harmony between man and his environment . . ." and ". . . promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . ."

In Section 42 U.S.C. 4331(a), Congress declared a policy to ". . . use all practicable methods and measures

. . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."

In 42 U.S.C. Section 4332(2), Congress explained how its stated policy should be carried out. In pertinent part, Congress required all agencies of the federal government to:

> (C) Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrivable commitments of resources which would be involved in the proposed actions should it be implemented.
>
> . . .

42 U.S.C. § 4332(2)(C)

NEPA contains no provisions describing the consequences of a failure to comply with any of its mandates, and further contains no provision outlining any enforcement procedures internal to the federal government. More-

over, NEPA contains no provision requiring federal agencies to choose one course of action over another based purely on matters detailed in the Environmental Impact Statements prepared pursuant to 42 U.S.C. Section 4332(C). By its terms, all NEPA requires is investigation and consideration of potential environmental impacts, whether negative or positive. Nothing in NEPA requires a federal agency to choose the most environmentally positive or the least environmentally negative course of action. All NEPA requires is that the agency be reasonably aware of potential impacts and take them into account in reaching its decision.

The role of NEPA in shaping agency decision making, and the role of the courts in enforcing NEPA, was clearly explained by this Court in *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 62 L.Ed. 2d 433, 100 S. Ct. 497 (1980). *Strycker's Bay v. Karlen*, involved a United States Department of Housing and Urban Development (HUD) urban renewal plan which called for construction of low income housing in New York City. After subsantial progress had been made toward completion of the plan, an action was brought in the United States District Court to enjoin HUD from constructing low income housing on the proposed site. The trial court denied injunctive relief, but, the United States Court of Appeals for the Second Circuit remanded requiring HUD to "study, develop and describe appropriate alternatives" pursuant to 42 U.S.C. Section 4332(2)(E). HUD prepared a report and, after preparation of the report, determined to continue with its initial plan. Again injunctive relief was sought, and again the District Court denied relief. The Court of Appeals for the Second Circuit reversed again, holding that HUD was required under NEPA to give "determinative weight" to environmental considerations in reaching its decision. *Strycker's Bay Council, Inc. v. Karlen* 590 F.2d 39 (2nd Cir. 1978). In reversing, the United States Supreme Court stated:

> In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 US 519, 558, 55 L.Ed. 2d 460, 98 S. Ct. 1197 (1978), we stated that NEPA, while establishing "significant substantive goals for the Nation," imposes upon agencies duties that are "essentially procedural." As we stressed in that case, NEPA was designed "to insure a fully informed and well-considered decision," but not necessarily a "a decision of the judges of the Court of Appeals or of this Court would have reached had they been members of the decision-making unit of the agency." Ibid. Vermont Yankee cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to make." (citation omitted)

444 U.S. at 227-228.

Thus, it is clear that the courts cannot impose their environmental druthers on federal agencies under the aegis of NEPA.

The United States Supreme Court recently affirmed and strengthened its statement in *Strycker's v. Karlen* in the case of *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed. 2d 351 (1989). In *Robertson*, citizen groups brought actions challenging the United States Forest Service's issuance of a special use permit for development and operation of a ski resort on national forest land in the State of Washington. The magistrate approved the EIS prepared by the Forest Service. However, the Ninth Circuit Court of Appeals held that the EIS was inadequate on the grounds that it did not deal with and provide for implementation of a com-

plete mitigation plan. The U.S. Supreme Court affirmed *Strycker's v. Karlen*, and further stated:

> . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. (Citations omitted) . . . In this case, for example, it would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, or 50 percent, or even 100 percent of the mule deer herd. Other statutes may impose substantive environmental obligations on federal agencies, [FN 14], but NEPA merely prohibits uninformed—rather than unwise—agency action.

490 U.S. at 350-351. The Court concluded as follows:

> We thus conclude that the Court of Appeals erred, first, in assuming that "NEPA requires that 'action be taken to mitigate the adverse affects of major federal actions,'" 833 F.2d at 819 (quoting *Stop H-3 Assn. v. Brinegar*, 389 F.Supp, at 1111), and, second, in finding that this substantive requirement entails a further duty to include in every EIS "a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action," 844 F.2d at 819.

490 U.S. at 353.

The United States Supreme Court's rulings in *Strycker's Bay v. Karlen* and *Robertson v. Methow Valley, supra*, are in accord with the overwhelming weight of authority from other federal district courts and courts of appeal. See *Chelsea Neighborhood Associations v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975); *State of Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir.

1984); *Sierra Club v. Marsh*, 714 F. Supp. 539 (D. Me. 1989); *Strycker's Bay Neighborhood Council v. City of New York*, 695 F. Supp. 1531 (E.D. N.Y. 1988). In an Alaska case brought by fishermen against the United States Forest Service, the District Court answered the plaintiff's contention that NEPA required the Forest Service to implement alternatives that compromised its proposed action as follows:

> . . . Plaintiff's contend that the Forest Service violated NEPA . . . by failing to consider alternatives that compromise this planning objective in light of competing interests and the resources involved.
>
> The court disagrees. Plaintiffs' NEPA argument is contrary to clear precedent and plaintiffs' regulatory argument is unsupported by authority. NEPA does not require a federal agency to consider alternatives which do not achieve the purpose contemplated for the proposed action, and NEPA does not circumscribe the agency's discretion in designating the project's purpose. . . .

Stein v. Barton, 740 F. Supp. 743, 748 (D. Alaska 1990), citing *City of Angoon v. Hodell*, 803 F.2d 1016, 1021 (9th Cir. 1986), cert. den. 484 U.S. 870, 108 S. Ct. 197, 98 L.Ed. 2d 148 1987).

The procedural nature of NEPA is further illustrated by cases recognizing that an EIS need not be prepared in certain instances, even where "major federal action" is contemplated. For example, an EIS is not required where an agency's action is deemed to be mandatory. See, for example, *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981), holding that NEPA compliance is not necessary where the agency was mandated to list endangered species upon specified factual findings. In *Natural Resources Defense Council, Inc. v. Berklund*, 609 F.2d 553 (D.C. Cir. 1979), the Court held that NEPA was not applicable when the Secretary had no discretion as to granting of coal leases under applicable statutes and

regulations. See also, *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980), cert. den. 449 U.S. 822, 101 S.Ct. 80, 66 L.Ed. 2d 24 (1980).

Finally, the procedural nature of the statute is apparent from the case law describing the principles to be followed in enforcing NEPA. The normal enforcement vehicle to date has been injunctive relief. The Courts are frequently asked to issue injunctions stopping work already underway on projects, or mandatory injunctions forcing agencies to do additional work on EIS's before an agency decision is carried out. *Citizens Advocates for Responsible Expansion v. Dole*, 770 F.2d 423 (5th Cir. 1985); *Richland Park Homeowners Association, Inc. v. Pierce*, 671 F.2d 935 (2d Cir. 1982); *National Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1982).

However, issuance of an injunction does not automatically follow a finding of a violation of NEPA. It is well settled that injunctive relief, even for matters involving NEPA non-compliance, are controlled by the normal equitable requirements of irreparable injury, inadequacy of legal remedy, and the normal balancing of equities. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed. 2d 91 (1982); *Town of Huntington v. Marsh*, 884 F.2d 648 (2d Cir. 1989), cert. den. —— U.S. ——, 110 S.Ct. 1296, 108 L.Ed. 2d 473 (1990) (construing NEPA); *Sierra Club v. Hennessey*, 695 F.2d 643 (2d Cir. 1982); *Conservation Society of Southern Vermont v. Secretary of Transportation*, 508 F.2d 927 (2d Cir. 1974), vac. on other grounds, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed. 2d 29 (1975).

For example, injunctive relief has been held not to be available where substantial work has been done on a project, or a project nearly complete. In *Forelaws on Board v. Johnson*, 743 F.2d 677 (9th Cir. 1984), the court refused to issue an injunction stopping the operation of long-term contracts for power delivery pursuant to the

Pacific Northwest Electric Power Planning and Conservation Act even though the Court found a violation of NEPA. The court refused injunctive relief on the basis that the contracts were already in operation, and any EIS prepared would more profitably be used to guide future actions under the contract. See, also, *Richland Park Homeowners Association v. Pierce*, *supra*, refusing injunctive relief to prevent the U.S. Department of Housing and Urban Development from providing money for rent subsidies of a low income apartment project on the grounds that the project was already complete. See, also, *Florida Wildlife Federal v. Goldschmidt*, 611 F.2d 547 (5th Cir. 1980), and *Romulus v. County of Wayne*, 634 F.2d 347 (6th Cir. 1980).

In sum, NEPA is "procedural" in the sense that:

1. It cannot dictate or control agency decisions or agency projects;

2. It need not be complied with when agency action is mandatory rather than discretionary; and

3. NEPA violations do not automatically result in injunctive relief, but rather are subject to all normal equitable considerations.

NEPA must be followed when appropriate, but failing to comply with NEPA is not automatically fatal to the agency action. The courts which have faced demands to declare agency action void *ab initio* because of NEPA noncompliance have so held. In *Richland Park Homeowners Association, Inc. v. Pierce*, *supra*, plaintiffs asserted that the United States Department of Housing and Urban Development's decision to fund a low income project must be "set aside" because HUD failed to comply with NEPA. The Court held:

> ". . . However the rule is that deficiencies in the environmental review process may be required to be corrected, but they do not void the initial agency

> decision. Initial non-compliance does not preclude eventual compliance. *Sierra Club v. Lynn*, 502 F.2d 43, 60 (5th Cir. 1974), cert. den. 421 U.S. 994, 95 S.Ct. 2001, 44 L.Ed.2d 484 (1975); *Upper Pecos Association v. Stans*, 500 F.2d 17, 19 (10th Cir. 1974).

671 F.2d at 943.

In *Forelaws on Board v. Johnson*, *supra*, the Ninth Circuit refused either to issue injunctive relief or declare power supply contracts, issued without an EIS, to be invalid.

Prior to the case at bar, the Tenth Circuit also had consistently held that non-compliance with NEPA did not void agency action. In *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), the Tenth Circuit Court of Appeals considered a claim by a dissident faction of the Tesuque Pueblo challenging the Secretary's approval of the lease at issue in this case. The plaintiffs asserted that the lease was void or cancelled because of the Department of Interior's non-compliance with NEPA. *Tewa Tesuque v. Morton*, *supra*, was decided by the Tenth Circuit approximately 18 months after its decision in *Davis v. Morton*, *supra*. And, Judge Barrett of the Tenth Circuit sat on both panels and wrote the opinion in *Tewa Tesuque v. Morton*. The Tenth Circuit recognized that injunctive relief may have been appropriate in *Davis v. Morton*, but held that the injunction requiring preparation of an EIS did not cause cancellation of the lease where it had been otherwise properly approved by the Secretary of Interior. The Tenth Circuit found it necessary to explain its holding in *Davis v. Morton*, and did so as follows:

> . . . The *Davis* case held, under the same 99-year lease, that approvals of the lease would be enjoined until an environmental impact statement had been filed. The Court also held that approval of leases on federal lands constitutes major federal action. *The suit did not, however, result in cancellation of the lease.* . . . Any prayer for relief insofar as it relates to the allegations set forth in the second and third

> causes of action of the complaint, i.e. violation of NEPA by failure to prepare an Environmental Impact Statement and violation of 25 U.S.C.A. § 415 by federal officials, has been rendered moot by our decision in *Davis*. . . . 498 F.2d at 243, (emphasis added).

At a time when the matter was fresh on its docket, the Tenth Circuit flatly stated that *Davis v. Morton* did not cancel SANGRE's Lease. Within a few months after *Tewa Tesuque v. Morton*, the Tenth Circuit considered the viability of a project approved in the absence of an EIS in *Upper Pecos Association v. Stans*, 500 F.2d 17 (10th Cir. 1974). In *Upper Pecos*, a grant of funds had been made for the construction of a forest road without the benefit of a prior EIS. The Court held that NEPA does not specifically require voiding *ab initio* a grant offer made prior to filing an Environmental Impact Statement.

Thus, the actions of federal agencies and departments must have meaning and effect regardless of the agency's non-compliance with NEPA. When dealing directly with the property rights of private parties, the United States' conduct, if not a nullity, must create enforceable rights upon which the private party has a right to rely. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972). See also, *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979). In *Kaiser Aetna*, the Supreme Court held that the owners and lessees of a private pond could not be forced to open the pond to navigation by the general public without payment or just compensation under the Fifth Amendment. The Corps of Engineers had consented to an improvment program of a pond which made the pond more accessible to an adjacent bay and open waters. Upon completion of the improvements, the Corps of Engineers asserted that the private pond had been transformed into navigable waters subject to its jurisdiction and that the pond had become a public aquatic park. The United States Supreme

Court relied in part on the government's initial consent to the owners to undertake the dredging and improvement operations to find a protectable property interest in the owners. The Court stated:

> While the consent of individual officials representing the United States cannot "estop" the United States (citations omitted), it can lead to the fruition of a number of expectancies embodied in the concept of "property—expectancies that, if sufficiently important, the government must condemn and pay for before it takes over the management of the landowners' property. 440 U.S. at 179, 62 L.Ed. 2d at 346.

In *Forelaws on Board v. Johnson, supra*, the Ninth Cir- leased premises for a period of approximately thirty (30) months pursuant to a properly executed and approved lease contract. It would be inappropriate to hold that the execution of the lease, and SANGRE's full exercise of its rights under the lease pursuant to otherwise appropriate approvals, did not create a vested property right in SANGRE simply because the Department of Interior was incorrect in its good faith policy that NEPA did not apply to its approval of Indian land leases. To make SANGRE, or any private contractor, pay for the agency's mistake in not correctly following the NEPA process lays the entire burden on the private party. See e.g. *Texas Oil and Gas Corp. v. Watt*, 683 F.2d 427 (D.C. Cir. 1982).

Gray v. Johnson, supra, and *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947), do not mandate a different result. Both cases are clearly distinguishable. In *Gray v. Johnson*, the lease approved was for a term of ten (10) years. The regulations then controlling leasing clearly provided that the maximum term of that kind of lease could only be five (5) years. Obviously, the local real property branch chief of the Bureau of Indian Affairs did not have authority to issue and approve a lease which clearly did not comply with the Department of Interior's own regulations. The

specific violation in *Gray v. Johnson*, went to the heart of the approval given. In SANGRE's case, it is undisputed that all Department of Interior regulations and statutory provisions were fully complied with.

Similarly, in *Federal Crop Insurance Corporation v. Merrill*, *supra*, crop insurance was issued on a crop which was excluded from coverage under the applicable Federal Crop Insurance Act. There was no question that the legislation did not provide coverage for plaintiff's crop. Plaintiff and the government's agents were ignorant of the applicable restriction even though it plainly appeared in the statute. The U.S. Supreme Court held that ignorance of the law could not overcome the specific limitations of coverage provided by the statute. Here again, the violation of the applicable legislation went to the heart of the contract entered into with the private citizen. The act of a local employee cannot expand the coverage of an act of Congress.

In contrast, NEPA requirements do not control whether or not the Department of the Interior could approve a lease of the Tesuque Pueblo lands. Clearly, the Department of Interior had the power and discretion to approve such a lease. It was not limited by NEPA in that regard. In failing to comply with NEPA the Department of Interior simply failed to accomplish one task it should have accomplished before actually issuing approval. The step not taken, however, was utterly unconnected with its power to act under substantive provisions of the law.

The failure of the Department of Interior to comply with NEPA is comparable to the failure of the Department of Interior to scrupulously follow procedures as occurred in *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982). In that case, the Jicarilla Apache Tribe requested that the District Court cancel oil and gas leases on the Jicarilla Reservation. The Tribe's request for cancellation was based on violations of the Department

of Interior's regulations with regard to notice of the sale of the leases. The court found that the violations, in fact, occurred. The Tribe cited *Gray v. Johnson, supra*, for the proposition that because of the violations of the department's notice requirements, the leases were void *ab initio* and must be cancelled. The Tenth Circuit refused to apply *Gray v. Johnson*, holding that the case does not compel an equity court to order cancellation of all leases on Indian lands for every procedural error in the leasing process. The Court decided it was impossible after years of exploration and development to put the parties back in status quo, and refused cancellation.

The same considerations are relevant and operative in SANGRE's case. It would have been impossible to place SANGRE and the Tesuque Pueblo in status quo ante after almost three years of development under the lease, including the sale of lots to third persons. Under *Jicarilla Apache Tribe v. Andrus, supra*, and the case law cited above describing the procedural nature of NEPA, it is legally incorrect to declare SANGRE's lease void *ab initio*.

Finally, SANGRE feels constrained to challenge the Tenth Circuit's holding that *Davis v. Morton*, itself invalidates SANGRE's lease. The Tenth Circuit simply misread its own opinion in *Davis v. Morton*. The issues presented on appeal in *Davis v. Morton* are stated succinctly by the Court:

> . . . Two issues are presented on appeal. First, does the Secretary's authority to ratify or reject leases relating to Indian lands constitute major federal action? Second, does 25 U.S.C. § 415, as amended, have any effect on a Lease signed before the amendments' enactment date? . . . 469 F.2d at 595.

The holding of the case is stated just as succinctly:

> . . . We conclude approving leases on federal lands constitutes major federal action and thus must be

> approved according to NEPA mandates . . . 469 F.2d at 597.

There is simply no language, indication or inference whatsoever in *Davis v. Morton* that the Court was deciding and ruling that the lease was invalid.

The relief granted by the Court in *Davis v. Morton* also argues against finding the lease invalid here. If the Court's ruling was that the lease was invalid, why would it remand the case for entry of an injunction ordering the Department of Interior to prepare an EIS for work to be done under the lease? If the lease was being declared invalid, the Order would have stated so, explicitly terminating the parties' interest in the Lease. This the Tenth Circuit did not do.

In the case below, the Tenth Circuit asserts that:

> In *Davis* we agreed with the environmental groups and the neighboring landowners that the Department was "without authority to grant the Lease since no environmental impact study was conducted prior to approval of the Lease as required by NEPA. . . ." *Davis*, 469 F.2d 594.

932 F.2d at 894-895.

This assertion is simply wrong. The language quoted from *Davis* in the Opinion below is merely part of the list of the assertion made by the *Davis* plaintiffs in the District Court. The Tenth Circuit did not deal with this assertion at all in *Davis*. SANGRE has searched in vain for any language in *Davis* indicating, in any way, that the Lease was invalid or that the Department was without authority to grant the Lease. Such language is not to be found. The potential invalidity, *ab initio*, of SANGRE's Lease was dealt with directly by the Tenth Circuit in *Tewa Tesuque v. Morton*, *supra*. As explained above, the Tenth Circuit specifically stated that *Davis v. Morton* did not have the effect of cancelling the Lease. It simply

required issuance of an injunction preserving the status quo while the EIS was prepared. 498 F.2d at 243.

CONCLUSION

The Tenth Circuit's decision that NEPA non-compliance voids SANGRE's lease *ab initio* stands alone in its holding. There is no support for the decision in the case law, the provisions of NEPA or the statute's policy aims. The Tenth Circuit's opinion is potentially pernicious in that it will encourage litigants to seek cancellation of agency decisions and projects rather than injunctive relief aimed at actually requiring compliance with NEPA. The potential effects on private parties contracting with federal agencies, or depending on federal agency approvals or permits for investments are serious, for no party can rely on agency actions that directly impact the contracting process. The Court should take this opportunity to clarify the consequences of NEPA non-compliance on contractual relations with private parties based or dependent on federal agency approvals. Private parties should not be made to pay the price for agency mistakes in complying with NEPA. That is SANGRE's unfortunate position. It must have a remedy.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-2238

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.,
A New Mexico Corporation,
Plaintiff-Appellant

JENNIE DEDEN BEHLES, Trustee in Bankruptcy for
Sangre de Cristo Development Company, Inc.,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 81-981-JB)

[Filed May 7, 1991]

Michael D. Bustamante (Arturo G. Ortega with him on the briefs), Albuquerque, New Mexico for Plaintiffs-Appellants.

Jeffrey P. Kehne, Attorney, Department of Justice, Environment & Natural Resources Division, Washington, D.C. (Richard B. Stewart, Assistant Attorney General, Land & Natural Resources Division, Washington, D.C., John A. Bryson, Attorney, Department of Justice, En-

vironment & Natural Resources Division, Washington, D.C., William L. Lutz, U.S. Attorney, Albuquerque, New Mexico, Herbert A. Becker, Assistant U.S. Attorney, Albuquerque, New Mexico, James E. Brookshire, Peter Monson, Attorneys, Department of Justice, Criminal Division—Appellate Section, Washington, D.C., Michael P. Healy, Attorney, Department of Justice, Washington, D.C. with him on the brief) for Defendant-Appellee.

Before LOGAN, ANDERSON, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

Appellants seek damages against the United States for harm suffered when the Department of the Interior allegedly cancelled a lease agreement reached between the appellants and the Tesuque Indian Pueblo. The appellants claim that the alleged lease cancellation by the Department of the Interior deprived them of a vested property interest and as a result entitles them to recover just compensation under the takings clause of the Fifth Amendment. In addition, the appellants claim that the United States is liable under contract and trust theories. The appellants have raised a battery of additional claims against the United States arising out of the lease, the viability of which depends upon whether the United States has waived its sovereign immunity. Finally, the appellants further allege that the United States negligently prepared an environmental impact statement, which prejudiced the appellants' ability to avail themselves of their rights under the lease.

The United States District Court for the District of New Mexico found for the United States on all the appellants' claims. The district court held that because the Department of the Interior's actions did not deprive the appellants of a vested property interest, the appellants'

Fifth Amendment just compensation claim was without merit. The district court also held that the United States was not liable for the lease under either a breach of contract or a breach of trust theory. The district court further held that Congress did not waive the United States' sovereign immunity with respect to a number of miscellaneous claims filed by the appellants and, therefore, dismissed them. Finally, the district court held that the Department of Interior had not negligently prepared the environmental impact statement. We affirm.

FACTS

In 1968, a number of Santa Fe, New Mexico residents came up with the idea to develop a world class golf course and residential community near Santa Fe on lands owned by the Tesuque Indian Pueblo ("Pueblo"). These individuals formed the Sangre de Cristo Development Company, Inc. ("Sangre"). Sangre negotiated with the Pueblo and on April 17, 1970, the Pueblo and Sangre signed a lease. The lease involved a total of approximately 5000 acres of Pueblo land, some of which were to be developed immediately while the remainder were to be leased pursuant to a series of option agreements contained in the lease. The lease was approved by the Department of the Interior ("Department") on May 2, 1970, as required under 25 U.S.C. § 415(a) (1970).

In May of 1971, Sangre began selling residential lots. On October 21, 1971, two neighboring landowners and two nonprofit environmental groups, seeking to enjoin construction, filed suit against the United States. They claimed that the United States' approval was invalid because no environmental impact study had been undertaken prior to the approval, and they requested an injunction prohibiting the United States from taking further action or granting further approvals pursuant to the lease until a proper environmental study had been completed. The district court denied the request for injunctive relief on

the grounds that no study was required under the National Environmental Policy Act ("NEPA"), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4331 et seq.). We reversed, holding that the Secretary's approval constituted a major federal action under NEPA which triggered the environmental impact study requirement of § 4332(2)(C). *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972). We remanded to the district court with instructions that it grant the relief requested by the neighboring landowners and environmental groups and enjoin the United States "from approving, allowing or acting in any way on submissions or approvals required or permitted under the lease agreement until the environmental impact of the project had been studied and evaluated ." *Id.* at 595. The injunction issued on January 31, 1973.

Over the course of the next four and one-half years, a number of entities, including the Bureau of Indian Affairs ("BIA"), the Council on Environmental Quality ("CEQ"), the Assistant Solicitor for Environmental Law, and Sangre, worked to prepare the environmental impact statement ("EIS"). In early 1976, the Pueblo, under new tribal leadership, began to express reservations regarding the lease. By April of 1976, the Pueblo formally requested that the Department void the lease. On August 25, 1977, the Department announced that it would rescind its prior approval of the lease based upon environmental considerations as well as the Pueblo's opposition to the lease. On October 26, 1977, Sangre was subjected to involuntary bankruptcy proceedings. The trustee of Sangre's estate has brought this civil action on behalf of the estate.

DISCUSSION

Part I of this opinion will address Sangre's claim of a wrongful taking under the Fifth Amendment of the Constitution. Part II will address Sangre's breach of contract/breach of trust claims based upon a purported

trust relationship between the Pueblo, the United States, and Sangre. Part III will address whether the United States waived its sovereign immunity with respect to a number of miscellaneous claims raised by Sangre. Part IV will address whether the Department negligently prepared the EIS.

I

Sangre argues that when the Department "rescinded" its approval of the lease on August 25, 1977, that this action constituted a taking under the Fifth Amendment, thereby entitling Sangre to recover "just compensation." As Sangre admits in its brief, for it to be successful on this argument, it must prevail on two separate points: (1) that at the time the alleged taking occurred, Sangre had a vested interest protectable under the Fifth Amendment; and (2) that the Department's action constiuted a taking under the Fifth Amendment. *See In re Consol. United States Atmospheric Testing Litig.*, 820 F.2d 982, 988 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). Because we hold that Sangre did not possess a vested interest in the lease at the time the Department rescinded its approval, we need not address the issue of whether the Department's action constituted a taking.

In *Davis v. Morton* we instructed the district court to grant the relief requested by the environmental groups and the neighboring landonwers: "the case is remanded to the trial court with directions to grant the relief prayed for." *Davis*, 469 F.2d at 598. The relief requested by the environmental groups and the neighboring landowners was

> to issue a preliminary and permanent injunction enjoining [the United States] from approving, allowing or acting in any way on submissions or approvals required or permitted under the lease agreement until the environmental impact of the project had been studied and evaluated. [The environmental groups and the neighboring landowners] further requested

> the court issue a Writ of Mandamus requiring [the United States] to follow mandates of NEPA before taking any future action on the Pueblo lease.

Id. at 595. Sangre contends that this language indicates that we did not invalidate the lease, but that we simply enjoined the project from continuing until the NEPA requirements were fulfilled. We disagree. We held that the initial approval of the lease by the Department was invalid because it was not preceded by the requisite environmental study. That the requested relief only sought an injunction against future action did not narrow the holding that the lease itself had never been validly approved.

In order for the lease to have been valid, the Department's approval was required:

> Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, education, recreational, residential or business purposes . . . . All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on the . . . Pueblo of Tesuque . . . which may be for a term of not to exceed ninety-nine years . . . .

25 U.S.C. § 415(a) (1970). Further, not just any Departmental approval would suffice—the approval must have been a valid approval. *See Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968), where we held that when the BIA approved a lease that was contrary to regulations and not in the best interest of the Indian lessors, the lessee never acquired a vested interest in the lease. In *Gray* we said, "[a]ctions by the local agency contrary to the regulations and contrary to the best interest of the Indian do not create a vested interest in the lease. Agents of the government must act within the bounds of their authority; and one who deals

with them assumes the risk that they are so acting." *Id.* *See also Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (holding that the government is not bound when its agent enters into an agreement that falls outside the agent's Congressionally delegated authority). In *Davis* we agreed with the environmental groups and the neighboring landowners that the Department was "without authority to grant the lease since no environmental impact study was conducted prior to approval of the lease as required by NEPA . . . ." *Davis*, 469 F.2d at 594.[1] Because we read 25 U.S.C. § 415(a) as requiring a valid approval from the Department in order for the lease contract to have legal effect, the invalid lease contract between Sangre and the Pueblo vested no property interest in Sangre.

The Department's August 25, 1977 action, regardless of whether it is referred to as a recision or merely a failure to approve, did not divest Sangre of a leasehold interest because Sangre's interest never vested in the first place. Therefore, we affirm the district court's dismissal of Sangre's Fifth Amendment takings claim.

II

Sangre contends that the United States is liable because it breached the lease. Sangre claims that the United States, by virtue of its pervasive involvement in the contract, became a party to the contract. Sangre attempts to strengthen its breach of contract claim by arguing that the United States is liable because it acted as a trustee.

The first step is to determine the nature of the relationship between the parties involved in the lease agreement. Clearly, the Pueblo was the lessor and Sangre was the lessee. The United States had no property interest in the

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[1] NEPA had been enacted *before* the Department's May 2, 1970 attempt to approve the lease—indeed, even before the Pueblo and Sangre reached their agreement in April of 1970.

Pueblo's land. The United States was involved only because its approval was required under 25 U.S.C. § 415(a). Nowhere in § 415 does Congress indicate that the United States is to act as a party to a lease contract between an Indian tribe and a lessee. Section 415 is no different than many other federal statutes that require federal approval of private agreements. We reject the argument that such statutes render the United States a party to agreements reached between private contracting parties merely because its approval is required before the agreements become effective.

Sangre attempts to bolster its breach of contract claim by blending in a breach of trust claim. Sangre claims that the United States acted as a trustee for the Pueblo throughout the contract negotiations and therefore, became liable to Sangre under a breach of trust theory. However, the United States can only be held liable to Sangre if the United States somehow contracted with Sangre on behalf of the Pueblo. *See* G. Bogert, *The Law of Trusts and Trustees* § 712 (Rev. 2d ed. 1982). The United States never entered into a contract with Sangre on behalf of the Pueblo. The parties agree that the Pueblo owned the land, that the Pueblo signed as the lessor, and that Sangre signed as the lessee. As noted, *supra*, the United States simply approved the lease.

Sangre argues that the United States did not have to sign the lease on behalf of the Pueblo because the Pueblo owned legal title due to an historic anomaly. Therefore, Sangre contends that we should not reject its breach of trust claim merely because the United States did not technically sign the lease agreement as a trustee. However, even if the United States had signed the lease as trustee for the Pueblo, that fact alone would not render the United States liable to Sangre.

In *United States v. Algoma Lumber Co.*, 305 U.S. 415 (1939), the Court held that the United States is not liable to third parties when it contracts with them on behalf of

Indian tribes. *Id.* at 423. *Algoma* a timber company had entered into a logging contract with the Klamath Indians. The contract was " 'between the Superintendent of the Klamath Indian School,[2] for and on behalf of the Klamath Indians, party of the first part' and the Lumber Company, 'party of the second part.' " *Id.* at 421. The contract was approved by the Department of the Interior. Payments for the timber were actually deposited into the United States Treasury for the benefit of the Indians. The lumber company ultimately claimed it had overpayed for the timber and it sued the United States as signatory on the contract to recover the overpayment. Although the facts weighing in favor of holding the United States liable in *Algoma* were stronger than in the instant case, the Court refused to extend liability to the United States because it was clear that the United States was acting for the benefit of the Klamath Indians. The *Algoma* opinion represents the Court's rejection of the trust theory of liability as a means of holding the United States contractually liable to third parties when it acts on behalf of Indians.

Sangre argues that the Court's more recent decision in *United States v. Mitchell*, 463 U.S. 206 (1983) overruled *Algoma*. In *Mitchell*, the Court held that the United States was involved in a "limited trust" relationship with the Quinault Indians[3] and thus, was liable to the tribe for mismanaging its timber resources. *Id.* at 226. Although the Court relied upon a "limited trust" theory to hold the United States liable *to the Indian tribe*, it was not presented with the issue of whether the United States can be held liable *to third parties* who, with the United States'

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[2] The Superintendent was a United States Government employee responsible for administering Klamath Indian assets for the benefit of the Klamath Indians.

[3] The statutes involved there were held to have created a trust status for the land, with the United States as trustee and the Indians as beneficiaries.

approval, contract with Indian tribes. Significantly, we note that the Court never even mentioned *Algoma* in its *Mitchell* opinion. Because we decline to accept Sangre's invitation to read *Mitchell* as overruling *Algoma*, we reject Sangre's breach of trust claim.

Further, as we held in Part I, the United States' initial approval of the lease was invalid because the applicable NEPA requirements had not been met. Therefore, even if the United States' signature could have rendered it liable under trust or contract theories, our 1972 *Davis* opinion, by invalidating the Department's approval, eliminated any liability under Sangre's breach of contract/breach of trust theories.

III

Sangre raises other claims, the viability of which depends upon whether the United States waived its sovereign immunity. In the absence of statutory authority to the contrary, the United States' immunity from suit is presumed. *See United States v. Shaw*, 309 U.S. 495, 500-01 (1940). The debate in this case centers around whether Congress intended to waive the United States' sovereign immunity when it enacted Public Law Number 96-549:

> Jurisdiction is hereby conferred on the United States District Court for the District of New Mexico to hear, determine, and render judgment on any legal claim for damages, *under existing law*, that the Sangre de Cristo Development Company, Incorporated, may have against the United States arising from the action of the United States in the initial approval and subsequent disapproval of the lease . . . or from the preparation of the environmental impact statement attendant to such lease. Such action must be filed within one year from the date of enactment of this Act and jurisdiction conferred by this section includes jurisdiction of any setoff, counterclaim, or other claim or demand whatever on the part of the United States against such corporation.

Pub. L. No. 96-549, 94 Stat. 3220, § 3 (1980) (emphasis added). Specifically, the parties disagree as to the meaning of the phrase "under existing law." Sangre contends that "under existing law" refers to common law. In other words, Sangre argues that so long as its claim is cognizable under common law, Sangre is entitled to bring it in federal court. The United States responds by arguing that Pub. L. No. 96-549 is merely a jurisdictional statute conferring jurisdiction on the United States District Court for the District of New Mexico, and that it does not provide Sangre with any substantive causes of action. The United States argues that Sangre must look to "other existing law" in order to find a waiver of the United States' sovereign immunity. Both sides agree that if the United States is correct, Sangre must bring its claims under the Federal Torts Claims Act (FTCA), specifically 28 U.S.C. §§ 2674 & 2680. The resolution of this issue is critical because several of Sangre's claims cannot make it past the Federal Tort Claims Act, including Sangre's tortious interference with contract claim and its misrepresenation claim, both of which are barred under 28 U.S.C. § 2680(h).

In *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Court held that "[w]aivers of immunity must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *Id.* at 685 (quotations, citations, and brackets omitted). Applying this rule of strict construction convinces us that the "under existing law" language contained in Pub. L. No. 96-549 does not refer to all claims under the common law, and it should not be construed to broaden the waiver of sovereign immunity expressly set forth in the FTCA.

The applicable legislative history is not adequate to convince us otherwise. The relevant portions of the House Report provide as follows:

> Section 3 of the substitute would authorize [Sangre] to file any claim that it might have against the

> United States under existing law with the U.S. District Court. The Committee wishes to make very clear its understanding and intent that neither this section nor anything else in the Act creates a claim against the United States. All this section is intended to do is to permit the corporation to sue the United States if it is not otherwise authorized to do so. Any legal claim it may have against the United States arising out of the subject transaction must be grounded on some existing law.
>
> . . .
>
> Section 3 confers jurisdiction on the U.S. District Court of New Mexico over any action filed by the corporation for damages against the United States arising out of the lease transaction. The section does not create a cause of action against the United States which does not already exist under existing law. It merely 'opens the court house door' if the corporation does not have any existing authority to sue the United States.

H.R. Rep. No. 96-1408. 96th Cong., 2d Sess. 4-5 (1980). Both parties contend that this expression of legislative intent supports their argument. In fact, this legislative history is ambiguous, and it does not enable us to resolve the ambiguity in the statute itself. As noted above, an ambiguous statutory reference will not be sufficient to waive sovereign immunity. A waiver will be found only when the language is clear and compelling. *Ruckelshaus v. Sierra Club*, *supra*. Construing Pub. L. No. 96-549 strictly, we must therefore find that it does not enlarge the waiver of sovereign immunity found in the FTCA, whatever other benefits it may have conveyed to Sangre in terms of vesting jurisdiction in the United States District Court for the District of New Mexico,[4] extending statutes of limitations, and eliminating other procedural

[4] We note that the headnote for section three of the statute is entitled "Jurisdiction."

requirements. It does not, however, create enforceable substantive rights. *See United States v. Testan*, 424 U.S. 392, 398 (1976). Thus, we deny Sangre's claim that when Congress enacted Pub. L. No. 96-549, it intended to waive the United States' sovereign immunity.

IV

The last issue we address is whether the district court erred when it found against Sangre on its negligence claim. We review the district court's factual finding that the United States was not negligent under the clearly erroneous standard. *Moreno v. Stahmann Farms, Inc.* 693 F.2d 106, 108 (10th Cir. 1982).

Sangre alleges that the United States was negligent in its preparation of the EIS and that this negligence unduly delayed the finalization of the EIS, which in turn proximately caused Sangre's loss. Assuming that Sangre is complaining here of only actionable nondiscretionary acts that contributed to the delay in the completion of the EIS, we find that the district court's findings of fact and its conclusion that the United States did not act negligently were not clearly erroneous. The district court's findings and conclusions on the issue of negligence are amply supported in the record, and accordingly we affirm the district court on this issue.

Accordingly, we AFFIRM the district court's order and judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV81-0981 JB

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., A New Mexico Corporation, and JENNIE DEDEN BEHLES, Trustee in Bankruptcy for Sangre de Cristo Development Company, Inc.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

[Filed Aug. 3, 1989]

This is a civil action for damages under Public Law 96-549, 94 Stat. 3219 (1980). The Plaintiffs are Sangre de Cristo Development Company, Inc., a New Mexico corporation, and its trustee in bankruptcy, Jennie Deden Behles. Jurisdiction is founded upon Public Law 96-549 and 28 U.S.C. § 1331. The case was tried to the Court without a jury. The Court's findings of fact and conclusions of law are incorporated in this opinion.

I. FACTUAL BACKGROUND

Santiago Campos had a dream. He envisioned a world-class golf course in or near Santa Fe, New Mexico. An avid golfer himself, Campos saw the proposed course as both a benefit to local golf enthusiasts and a boon to Santa Fe's tourism industry. He thought he knew just the place

for the proposed golf course: a tract of land located on the Indian reservation of the Pueblo of Tesuque. Campos was aware that the Tesuque pueblo had leased a small tract of land to a private individual for use as a riding stable, and land adjacent to that facility seemed ideally suited for use as a golf course because of its natural beauty and also its location just north of Santa Fe. Campos approached the tribal governor, Joe Vigil, with his proposal to lease some land for development, and shortly thereafter met with the Pueblo Council. At this first meeting, on August 15, 1968, the discussion was limited to the proposed lease of 400 to 600 acres for development of a golf course facility. As discussions continued between Campos and the leaders of the Pueblo, however, proposals for additional development were put forward. By late 1968, discussions revolved around a proposed lease of 1300 to 1400 acres located at the southern end of the reservation. The tract of land in question was bounded on the west by U.S. Highway 285, on the east by State Highway 22, and on the north by a large arroyo that ran generally east to west.

In September, 1968, Campos and his law partners, Walter Kegel and Fred Standley, formed the corporation that came to be known as Sangre de Cristo Development Company, Inc. This corporation was formed to lease the land from the Pueblo. Negotiations continued between tribal leaders and the representatives of the newly formed corporation. Sometime around January, 1969, the tribe proposed that Sangre de Cristo lease all tribal lands lying east of U.S. Highway 285, an area in excess of 5000 acres. An agreement was finally reached by the terms of which the Pueblo would lease to Sangre de Cristo a 1300 acre tract of land call "Tract I", and grant options on four other tracts, thereby subjecting to the lease approximately 5400 acres. During these discussions, the intended purpose of the lease had also expanded. By the time the lease was actually signed, it contemplated not only development for recreational purposes, but also extensive de-

velopment for residential and commercial purposes. In fact, a small city with up to 16,000 inhabitants was part of the final plan arrived at by the parties.

The Pueblo of Tesuque, like other Indian tribes, was under the trust supervision of the Bureau of Indian Affairs, United States Department of the Interior. From almost the very beginning, local representatives of the Bureau were involved in the lease discussions. Under the provisions of 25 U.S.C. § 415, the Secretary of the Interior was required to approve any lease of Pueblo land. The 99 year lease involved in this case was executed on April 17, 1970, by the Pueblo of Tesuque as lessor and the Sangre de Cristo Development Company, Inc. as lessee. On May 2, 1970, the lease was approved by the Area Supervisor of the Bureau of Indian Affairs on the authorization of the Secretary of the Interior. Prior to the execution and approval of the lease, there was no discussion of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq, and no attempt to prepare an environmental impact statement under § 102(C) of the Act, 42 U.S.C. § 4332(C).

In November, 1970, Sangre de Cristo submitted to the Bureau of Indian Affairs a comprehensive development plan for the 1300 acres known as Tract I. The plan called for commercial, recreational, and residential development. The sale of individual lots in the residential subdivision began in May, 1971. On October 21, 1971, two individuals residing near the Tesuque reservation and two environmental groups filed an action in the United States District Court for the District of New Mexico, seeking to enjoin any further development under the lease by Sangre de Cristo. The plaintiffs contended that the Secretary of the Interior had violated § 102(C) of the National Environmental Policy Act, 42 U.S.C. § 4332 (C), because he approved the lease from the Pueblo of Tesuque to Sangre de Cristo without first obtaining an environmental impact statement. The issue presented was

whether the Secretary's approval of the lease was a "major federal action" as that term was used in the National Environmental Policy Act. On December 21, 1971, the trial court denied injunctive relief. *Davis v. Morton*, 335 F.Supp. 1258 (D.N.M. 1971). The plaintiffs perfected an appeal. On November 24, 1972, the United States Court of Appeals for the Tenth Circuit issued its opinion reversing the decision of the trial court and remanding the case with directions. *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972). The Tenth Circuit concluded that the action of the Secretary in approving leases on Indian lands did constitute major federal action, and required compliance with the requirements of the NEPA. Upon remand, the district court issued an injunction on January 31, 1973, prohibiting any further development under the Sangre de Cristo lease until an environmental impact statement was obtained.

Before the ink was dry on the Tenth Circuit opinion, Bureau of Indian Affairs personnel began work on an environmental impact statement in connection with the Tesuque lease. The first preliminary draft of an environmental impact statement was completed in December, 1972. Mr. Eugene Quadri, who had been designated as the Area Environmental Specialist for the Albuquerque area office of the Bureau of Indian Affairs, was assigned to revise the preliminary draft. The second draft of the environmental impact statement was completed in March, 1973. This draft was circulated throughout the area for comments. Apparently comments were received, and another draft was prepared. On May 29, 1973, this draft environmental statement was sent to Washington for review.

While the draft environmental statement was under review by Interior Department personnel in Washington, an unexpected development occurred with respect to Sangre de Cristo itself. A new group of investors, including R.E. Dugger, Dick Blenden, and R.E. O'Kelly,

purchased almost all the stock in Sangre de Cristo from the previous shareholders. This transaction was completed on November 14, 1973. At the time they purchased the stock in Sangre de Cristo, Blenden, Dugger, and O'Kelly were aware that all development under the lease had been enjoined by the district court in Albuquerque pending the approval of an environmental impact statement. Before making the decision to purchase the stock, Blenden met with Quadri in an attempt to determine the status of the work being done on the environmental impact statement. Quadri requested a detailed plan for the development of the leased land for use in completing the environmental impact statement. Blenden recognized the need for that, and agreed to furnish one. Toward that end, Blenden and his associates entered into a contract with a firm called Bohannan Engineering to do a developmental study of the leased property. In an attempt to forestall anticipated questions about the availability of water for development of the land, the new owners of Sangre de Cristo also entered into a contract to purchase a ranch near Questa, New Mexico that possessed water rights arguably transferable to the Tesuque Pueblo land. According to Blenden, he was doing his utmost during this period to assist the area office of the Bureau of Indian Affairs to complete the draft of the environmental impact statement as soon as possible. In December, 1974, another draft of an environmental impact statement was sent by the area office to the Department of the Interior in Washington, D.C. When the draft EIS arrived in Washington, it was reviewed by Gary L. Bohlke, an Assistant Solicitor for Environmental Law in the Department of the Interior. On January 22, 1975, Bohlke wrote a memorandum criticizing many aspects of the draft EIS. When those criticisms were made known to the Sangre de Cristo principals, Blenden went to Washington and had a meeting with Bohlke and other Department of the Interior personnel. The upshot of the meeting was that a Draft Environmental Impact State-

ment was issued for public comment on April 18, 1975. A public hearing was scheduled in Santa Fe and was held on May 23, 1975. Many people attended the hearing and made comments on the Draft Environmental Impact Statement. Written comments on the report were invited, with a deadline date of June 23, 1975. On June 27, 1975, a committee was appointed to review the public comments. After the completion of that review, a draft of a final EIS was sent to Washington on March 26, 1976.

Shortly after the submission of the final draft, another unexpected development occurred. The Pueblo of Tesuque had elected a new tribal governor, who took office on January 1, 1976. The new leadership of the Tesuque Pueblo was disenchanted with the Sangre de Cristo lease. On April 10, 1976, the Tribal Council passed a resolution requesting that the Secretary of the Interior suspend all work on the Environmental Impact Statement pending further study of the Sangre de Cristo lease by the Council. On April 15, 1976, the Department decided to honor the Pueblo's request and to suspend temporarily any further review of the draft final EIS. This action was not communicated to Sangre de Cristo, and its principals were not aware of it until several months later. In any event, no review of the draft final EIS occurrtd in the Department of the Interior between April, 1976, and January, 1977. The end of the impasse coincided very closely with the change of administration in Washington that occurred in January, 1977. On January 31, 1977, the Acting Undersecretary of the Interior Department wrote to the Acting Commissioner of the Bureau of Indian Affairs that the Department would proceed immediately to complete the environmental impact statement. Based upon legal advice received from the departmental Solicitor, the Acting Undersecretary expressed the opinion that upon compliance with the National Environmental Policy Act, the Secretary of the Interior would have the discretion to

reinstate the lease, modify it, or cancel it. Pursuant to the instructions of the Acting Undersecretary, the Bureau of Indian Affairs resumed review of the environmental impact statement and advised the Undersecretary that the Final Environmental Impact Statement would be released to the public about April 4, 1977. Once again, this deadline was not met. In the meantime, the Tribal Council of the Pueblo of Tesuque had met again, and had gone on record with a formal request that the Sangre de Cristo lease be voided by the Secretary.

On July 29, 1977, the officials of the Department of the Interior met in Albuquerque with parties interested in the Sangre de Cristo lease to discuss decision options. According to a Decision Options Document prepared by the Interior Department (Plaintiffs' Exhibit 338), five alternatives were under consideration: (1) reapproval of the Sangre de Cristo lease without change; (2) reapproval of the lease with modifications; (3) disapproval of the lease; (4) deferral of action for further study, and (5) taking no action to approve or disapprove the lease on the theory that the Pueblo's resolution rescinding its prior approval of the lease rendered it null and void. No decision was announced at that meeting, but it was obvious that one would be forthcoming shortly. On August 25, 1977, James A. Joseph, Undersecretary of the Interior, announced that the Department would disapprove the lease based upon environmental considerations and the Pueblo's clear opposition to the lease and its rescission of its prior approval. Approximately two months later, on October 26, 1977, Sangre de Cristo Development Company, Inc. became the subject of an involunary bankruptcy proceeding. It is the Trustee in Bankruptcy who brings this civil action on behalf of the bankrupt estate.

II. SCOPE OF PUBLIC LAW 96-549

In 1980, some three years after the cancellation of the Sangre de Cristo lease and the filing of the Sangre de Cristo bankruptcy, Congress passed special legislation

which authorized the bringing of the instant suit. Pub. L.No. 96-549, 94 Stat. 3219 (1980). Section 3 of the statute reads as follows:

> Jurisdiction is hereby conferred on the United States District Court for the District of New Mexico to hear, determine, and render judgment on any legal claim for damages, under existing law, that the Sangre de Cristo Development Company, Incorporated, may have against the United States arising from the action of the United States in the initial approval and subsequent disapproval of the lease described in Section 1(c) of this Act or from the preparation of the environmental impact statement attendant to such lease. Such action must be filed within one year from the date of enactment of this Act and jurisdiction conferred by this section includes jurisdiction of any setoff, counterclaim or other claim or demand whtaever on the part of the United States against such corporation.

The parties disagree sharply as to the correct interpretation of this statute. The Defendant contends that it is a grant of jurisdiction and nothing more; the Plaintiffs contend that it is a waiver of sovereign immunity as well as a grant of jurisdiction. This issue should be determined first, as it may lead to the disposition of some of the claims asserted by the Plaintiffs.

The statute itself seems relatively clear and unambiguous. By its very wording, it confers upon this Court jurisdiction over legal claims for damages "under existing law" arising out of the transactions between Sangre de Cristo and the Government. The phrase "under existing law" would seem to refer to previous waivers of sovereign immunity, such as the Tucker Act, 28 U.S.C. § 1346(a), and the Federal Tort Claims Act, 28 U.S.C. § 1346(b). This conclusion is supported by the legislative history of the statute. H.R. No. 1408, 96th Cong., 2d Sess., states as "background" to Section 3 of the statute:

> Section 3 of the substitute would authorize the Sangre de Cristo Development Company, Inc. to file any claim that it might have against the United States under existing law with the U.S. District Court. The Committee wishes to make very clear its understanding and intent that neither this section nor anything else in the Act creates a claim against the United States. All this section is intended to do is to permit the corporation to sue the United States if it is not otherwise authorized to do so. Any legal claim it may have against the United States arising out of the subject transaction must be grounded on some existing law.

On page 5 of the House Committee Report, these further comments are made concerning Section 3:

> Section 3 confers jurisdiction on the U.S. District Court of New Mexico over any action filed by the corporation for damages against the United States arising out of the lease transaction. The section does not create a cause of action against the United States which does not already exist under existing law. It merely 'opens the courthouse door' if the corporation does not have any existing authority to sue the United States. Any rights the United States may have against the corporation for offsets or counterclaims is preserved.

This statement would appear to express clearly the intent of Congress not to waive sovereign immunity with respect to any proposed claim by the corporation not recognized under previously existing law. It is well settled, of course, that a waiver of sovereign immunity must be specific. *United States v. Testan*, 424 U.S. 392, 401 (1976). A mere grant of jurisdiction does not, without more, effect a waiver of sovereign immunity. *United States v. Testan, supra.*

The Plaintiffs argue vigorously that Public Law 96-549 is useless and meaningless if not interpreted as a waiver

of sovereign immunity. This argument, however, is not persuasive. Section 3 of Public Law 96-549 conferred numerous benefits upon the Plaintiffs apart from any such alleged waiver. First, it extended until December, 1981, the statute of limitations with respect to any cause of action, whether sounding in contract or in tort, arising out of a series of transactions which had occurred between 1968 and 1977. In the absence of the special legislation, some of these claims would have been barred by limitations. Second, the statute apparently waived the requirement of the filing of an administrative claim as a prerequisite to suit under the Federal Tort Claims Act. See 28 U.S.C. § 2675(a). Third, it permitted the Plaintiffs to file claims not sounding in tort in which the amount in controversy exceeds $10,000.00 in the United States District Court in New Mexico rather than in the Court of Claims in Washington, D.C. See 28 U.S.C. §§ 1346(a)(2), 1491. This is the meaning of the phrase "opens the courthouse door" as used in the congressional reports.

A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *United States v. Mitchell*, 445 U.S. 535, 539 (1980); *United States v. King*, 395 U.S. 1, 4 (1969). No such unequivocal expression can be found in the instant statute. The Court finds that Public Law 96-549 did not operate as a waiver of sovereign immunity and created no new causes of action not already recognized by federal law.

III. CLAIMS BARRED BY SOVEREIGN IMMUNITY

The Congress has, on occasion, enacted blanket waivers of sovereign immunity. Two prominent examples are the Tucker Act, 28 U.S.C. §§ 1346(a), 1491, and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. To the extent that the Plaintiffs' claims fall within these waivers of sovereign immunity, they may be maintained; otherwise, they may not. It is necessary to examine each in-

dividual cause of action or theory of recovery pled in the Plaintiffs' complaint in order to determine which ones are viable and which ones are not.

One of the Plaintiffs' theories of recovery is that the Defendant's agents tortiously interfered with the contractual relationship between Sangre de Cristo and the Pueblo of Tesuque (Complaint, Count III). However, the Federal Tort Claims Act specifically excludes from its coverage "any claim arising out of . . . interference with contract rights . . .". 28 U.S.C. § 2680(h). The claim asserted in Count III of Plaintiffs' complaint must therefore, be dismissed because of the defense of sovereign immunity.

In Count IV of their complaint, the Plaintiffs also allege that Defendant "intentionally, or negligently, misrepresented to Sangre its attitude toward Sangre and toward the completion of the proposed project and the lease, and also misrepresented its actual intentions and efforts with regard to production of the environmental impact statement" (Complaint, Paragraph 84). The Federal Tort Claims Act, however, excludes from its coverage "any claim arising out of . . . misrepresentation . . .". 28 U.S.C. § 2680(h). This claim cannot survive the defense of sovereign immunity, and must be dismissed.

In Count VI of the complaint, the Plaintiffs allege that the Defendant deprived Sangre of substantial property rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Although the Due Process Clause of the Fifth Amendment establishes and protects important substantive rights, it does not authorize a suit for money damages against the United States Government in the absence of a specific waiver of sovereign immunity. *United States v. Testan, supra* at 400-401; *Duarte v. United States*, 532 F.2d 850, 852 (2d Cir. 1976); *Boyce v. United States*, 523 F.Supp. 1012, 1016-17 (E.D.N.Y. 1981); *Hampton v. Hanrahan*, 522 F.Supp. 140, 147-50

(N.D.Ill. 1981). To the extent that Count VI of the Plaintiffs' complaint is founded upon the Due Process Clause of the Fifth Amendment, it must be dismissed.

The remaining theories of recovery pled in the Plaintiff's complaint fall roughly into three categories: claims sounding in tort, claims sounding in contract, and constitutional claims. The three categories will be discussed separately.

IV. PLAINTIFFS' TORT CLAIMS

In Count I of their complaint, the Plaintiffs contend that Interior Department personnel were negligent in two different respects. First, they allege that the Department was negligent in failing to recognize the applicability of the National Environmental Policy Act to the lease in question. Second, they allege that the Department was negligent in its unreasonable delay in the production of an environmental impact statement. According to the Plaintiffs, these acts and omissions on the part of the Defendant's agents proximately caused great loss and damage to them.

The Court notes in passing that the Plaintiffs have not stated a cause of action arising out of the decision of the Undersecretary of the Interior in August, 1977, to disapprove the Sangre de Cristo lease. That decision by Undersecretary Joseph involved an exercise of discretion which is not actionable under the Federal Tort Claims Act. 28 U.S.C. § 2680(a); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980). The Defendant argues somewhat persuasively that this should end the hunt, for the reason that the Plaintiffs' provable damages, if any, were proximately caused in their entirety by this decision. The Court finds it unnecessary to decide that question, however, because the Plaintiffs have failed to sustain their burden of proving negligence in either respect.

As to the Plaintiffs' first theory of negligence, it is possible to say in the light of hindsight that the Bureau

of Indian Affairs and the Department of the Interior erred in failing to recognize the applicability of the National Environmental Policy Act to this particular lease of Indian land. However, hindsight and foreseeability are two different things. In 1970, it was very much an open question as to whether or not the NEPA was applicable to leases of Indian lands. The Department of the Interior took the position that it was not applicable. When that position was challenged in court, the Department won the first round. In his district court opinion, Judge Bratton arrived at the following conclusion of law:

> The Secretary's approval of the lease in question was not 'major federal action' as that term is used in the NEPA and the Secretary was not required to obtain an environmental impact statement thereunder prior to that approval. *Davis v. Morton*, 335 F. Supp. 1258, 1261 (D.N.M. 1971).

It was not until November 24, 1972, some two and one-half years after the Secretary's approval of the Sangre de Cristo lease, that the Court of Appeals for the Tenth Circuit reversed Judge Bratton and held that the Sangre de Cristo lease was subject to approval under NEPA procedures. *Davis v. Morton*, 469 F.2d 593, 597-8 (10th Cir. 1972).[1] The Plaintiffs' claim that the Defendant was negligent in failing to appreciate the applicability of the NEPA cannot be sustained.

Plaintiffs also contend that the Defendant's agents unreasonably delayed the preparation and completion of the environmental impact statement; that this was negligence, and that such negligence proximately caused loss and damage to them. In this connection, the Defendant again argues rather persuasively that the Plaintiffs have failed to prove the element of proximate cause. That contention has arguable merit because the present owners

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[1] The Ninth Circuit later agreed with the Tenth with respect to the applicability of the NEPA to leases of Indian lands. *Cady v. Morton*, 527 F.2d 786, 793 (9th Cir. 1975).

of Sangre de Cristo purchased their stock in the corporation in November, 1973, well knowing at the time that all development under the lease had been enjoined pending compliance with the NEPA. Therefore, the argument goes, they were aware of the risk that the lease would be disapproved, or, in the exercise of reasonable prudence, they should have been aware of it. Furthermore, a substantial part of the out-of-pocket costs which they claim as damages were incurred in the process of obtaining information necessary to the completion of the environmental impact statement, and these expenditures would have been necessary in any event. It is unnecessary to decide this point, because the Court finds that Plaintiffs have failed to prove negligence in the preparation and issuance of the environmental impact statement.

Until November, 1972, the Interior Department took the position that the NEPA was not applicable to the lease in question. The decision of the Tenth Circuit in *Davis v. Morton, supra,* triggered the preparation of an environmental impact statement. The EIS went through several drafts and redrafts before it was published in 1975 and submitted to the public for comments. Although the process was slow, several factors were involved. First, the NEPA procedures were fairly new, and the personnel of the Bureau of Indian Affairs and the Department of the Interior were relatively inexperienced in the production of environmental impact statements. Second, a new group of owners took control of the Sangre de Cristo Corporation during the process, and they began to submit new information and new plans for development of the leased land which brought about additional environmental impact work. Finally, in common with everything else in government, the preparation of environmental impact statements may be subject to budget limitations. The National Environmental Protection Act itself does not put a time limit on the completion of environmental impact statements, and the Plaintiffs have cited no authority in support of a contention that the Court

should impose one. The Plaintiffs have failed to sustain their burden of proving that the Defendant's agents "unreasonably" delayed the production and completion of the environmental impact statement in this case.

In Count V of the complaint, the Plaintiffs plead another theory of recovery in tort based upon New Mexico law. They allege that in negotiating the lease and later during the preparation of the environmental impact statement, the Defendant unfairly used its superior bargaining position to the detriment of Sangre de Cristo. The Plaintiffs rely upon *Terrel v. Duke City Lumber Company, Inc.*, 86 N.M. 405, 524 P.2d 1021 (N.M. Ct.App. 1974), modified, 88 N.M. 299, 540 P.2d 229 (N.M. 1975). In that case, the New Mexico Court of Appeals described this theory of recovery in the following terms:

> The rationale of the doctrine is to discourage or prevent an individual in a stronger position, usually economic, from abusing that power by presenting an unreasonable choice of alternatives to another person in a weaker or more vulnerable position in a bargain situation. That is to say the doctrine provides a cause of action so that an individual can protect his economic interests from the unreasonable exercise or advantage, usually economic, in a bargain situation. *Terrel v. Duke City Lumber Company, Inc.*, 524 P.2d at 1038.

Although Terrel recognizes a cause of action for "economic duress", the question is whether the Plaintiffs have proved their right to recover any damages under that theory in this case. In order to do so, the Plaintiffs must show that the Defendant had a duty to present them with a reasonable choice of bargaining alternatives, that the Defendant breached that duty, and that such breach forced them into an unfavorable bargain against their will. *Terrel v. Duke City Lumber Company, Inc., supra.* The Plaintiffs have the burden of proving each of the elements by clear and convincing evidence. *Terrel v. Duke City Lumber Company, Inc., supra.*

In the instant case, the Plaintiffs contend that the Defendant abused its superior bargaining position and power to the detriment of Sangre de Cristo in each of the following respects: (1) during lease negotiations, it forced Sangre de Cristo to proceed with the lease without complying with the National Environmental Policy Act; (2) it failed to cooperate with and assist Sangre de Cristo in the litigation of various matters affecting the Tesuque lease; (3) it forced Sangre de Cristo to divert its resources from actual development of the leased land to preparation of an environmental impact statement, and (4) it withdrew its approval of the lease, destroying Sangre's business.

With respect to the first contention, the evidence fails to support any claim that the Government "forced" Sangre de Cristo to proceed with lease negotiations without complying with tht National Environmental Policy Act. None of the parties negotiating the lease contemplated the applicability of the NEPA, and the matter was discussed only in passing, if at all. All parties, including the Defendant, adamantly took the position that the NEPA was not applicable to the lease, and that position was maintained until November, 1972, when the Tenth Circuit held to the contrary.

The second contention arises from the fact that Sangre de Cristo was involved in a variety of litigation concerning the existence or nonexistence of city, county, and state jurisdiction over its real estate development, relating to such things as taxes, zoning, and so on. The complaint alleges that the Defendant failed "to cooperate with and assist Sangre to litigate numerous suits affecting the jurisdictional position of the Defendant and the Pueblo of Tesuque" (Complaint, para. 90). However, a mere failure to act under these circumstances does not constitute an "unreasonable exercise of power or advantage . . . in a bargain situation" which will give rise to a cause of action under New Mexico law. *Terrel v. Duke City Lumber Company, Inc., supra*, 524 P.2d at 1038.

The contention that the Defendant abused superior economic or bargaining power by forcing Sangre de Cristo to spend money on the preparation of an environmental impact statement is untenable. In the wake of the decision of the Court of Appeals in *Davis v. Morton*, the district court enjoined all further development activity pending the completion of an acceptable environmental impact statement. Development activities were halted by court order, not by the Bureau of Indian Affairs or the Department of the Interior. Furthermore, it was in Sangre de Cristo's own self-interest to allocate its resources to the extent they were necessary to hasten the completion of the environmental impact statement. In short, "superior bargaining position" had nothing to do with it.

Finally, the Plaintiffs contend that the Defendant exercised its superior bargaining power in bad faith in withdrawing its approval of the lease. As noted earlier, the decision to disapprove the lease on August 25, 1977, was the exercise of a discretionary function, specifically excluded from the coverage of the Federal Tort Claims Act by 28 U.S.C. § 2680(a). The decision to disapprove the lease cannot give rise to any cause of action on the part of the Plaintiffs.

V. PLAINTIFFS' CONTRACT CLAIM

Count II of the Plaintiffs' complaint alleges that the disapproval of the Sangre de Cristo-Tesuque Pueblo lease on August 25, 1977, constituted a breach of contract. This theory does not find support in either the law or the facts. In the first place, in exercising its powers and responsibilities as a trustee for an Indian tribe with respect to a lease of Indian lands, the United States Government does not become a party to the lease. *United States v. Algoma Lumber Company*, 305 U.S. 415 (1939). That principle of law is specifically applicable to the instant case. See *Davis v. Morton*, *supra*, 335 F.Supp. at 1260. Since the United States Government was not a party to the lease contract, it cannot be guilty of its breach.

In an imaginative variation on this theme, the Plaintiffs contend that sometime after January 31, 1973, Sangre de Cristo and the United States Government entered into an unwritten contract regarding the production of an environmental impact statement. As the previous discussion in this opinion has illustrated, however, the preparation of an environmental impact statement was required not by contract, but by statutory law as interpreted by the courts. The Department of the Interior had the statutory duty to follow the dictates of the National Environmental Policy Act in deciding whether to approve or disapprove the lease in this case; to prepare an adequate and proper environmental impact statement, and to consider its contents in deciding whether to give its approval to the lease. By no stretch of the imagination did it have a contract, express or implied, with Sangre de Cristo to do the work which the statute required it to do. Judgment must be entered for the Defendant with respect to the Plaintiffs' contract claims.

VI. PLAINTIFFS' CONSTITUTIONAL CLAIMS

Count VI of the complaint alleges a taking of property without just compensation in violation of the Fifth Amendment to the Constitution of the United States. Basic to their theory of recovery is the Plaintiffs' position that Sangre de Cristo had property rights in the Tesuque lease prior to January 31, 1973. However, the statute governing such leases of Indian lands, 25 U.S.C. § 415, required the approval of the Secretary of the Interior before such a lease could become effective. Although the Secretary purported to approve the Sangre-Tesuque lease in May, 1970, the courts later held that approval to be ineffective because of noncompliance with the NEPA. *Davis v. Morton, supra*, 469 F.2d at 597-8. It is well settled that a contract with an Indian tribe that requires federal approval is invalid in the absence of such approval. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985); *Jus-*

theim Petroleum Company v. Department of the Interior, 769 F.2d 668 (10th Cir. 1985); *Gray v. Johnson*, 395 F.2d 533 (10th Cir. 1968), *cert. denied*, 392 U.S. 906 (1968); *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985); *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457 (9th Cir. 1986). Since the Secretary's initial approval of the lease in the instant case was invalid, the lease itself was either void or voidable. No taking of property occurred when the lease was later disapproved after proper compliance with the NEPA. Agents of the government, including employees of the Bureau of Indian Affairs and the Department of the Interior, must act within the boundaries of the authority conferred upon them by law, and a private individual who deals with them assumes the risk that they are so acting. *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380, 384 (1947); *Gray v. Johnson*, *supra*, at 537. The government is not estopped from later asserting that its officers or agents lacked authority to enter into a particular agreement. *Utah Power and Light Company v. United States*, 243 U.S. 389, 409 (1917). Furthermore, it is settled that estoppel does not run against the government when it acts in its capacity as trustee for an Indian Tribe. *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1110 (10th Cir. 1976). Since the Secretary's approval of the lease in the instant case was never effective nor valid, his disapproval did not result in a taking of "property" within the meaning of the Fifth Amendment.

VII. CONCLUSION

In light of the foregoing discussion, the Court concludes that the Plaintiffs are not entitled to recover damages from the Defendant. A judgment should be entered accordingly.

It is therefore ORDERED that judgment be, and it is hereby, ENTERED in favor of the Defendant, and that the Plaintiffs take nothing by their suit.

SIGNED AND ENTERED this 1st day of August, 1989.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-2238

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., a New Mexico Corporation; JENNIE DEDEN BEHLES, Trustee in Bankruptcy for Sangre de Cristo Development Company, Inc.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

Filed September 24, 1991

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellant Procedure, the suggestion for rehearing en banc

was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-412

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., *et al.*,
Petitioners

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 22nd, 1992.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 11th day of December, 1991.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

§ 4321. Congressional declaration of purpose

The purposes of this Act [42 USCS §§ 4321 et seq.] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Jan. 1, 1970, P. L. 91-190, § 2, 83 Stat. 852.)

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act [42 USCS §§ 4321 et seq.], it is the continuing responsi-

bility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Jan. 1, 1970, P. L. 91-190, Title I, § 101, 83 Stat. 852.)

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public

laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and ob-

tain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evalutes such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the

scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[;]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternatives uses of available resouces;

(F) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

(Jan. 1, 1970, P. L. 91-190, Title I, § 102, 83 Stat. 853; Aug. 9, 1975, P. L. 94-83, 89 Stat. 424.)

25 U.S.C. § 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention

entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

(R. S. § 2116.)

25 U.S.C. § 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

(a) Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, and leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Moapa Indian reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the Burns Paiute Reservation, the Coeur d'Alene Indian Reservation, the Kalispel Indian Reserva-

tion, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Tulalip Indian Reservation, the Navajo Reservation, and the lands comprising the Moses Allotment Numbered 10, Chelan County, Washington which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial terms of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extention of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

(b) Any lease by the Tulalip Tribes under subsection (a) of this section, except a lease for the exploitation of any natural resource, shall not require the approval of the Secretary of the Interior (1) if the term of the lease does not exceed fifteen years, with no option to renew, or (2) if the term of the lease does not exceed thirty years, with no option to renew, and the least is executed pursuant to tribal regulations previously approved by the Secretary of the Interior.

APPENDIX F

Pub. L. No. 96-549, 94 Stat. 3219 (1980)

NINETY-SIXTH CONGRESS OF THE
UNITED STATES OF AMERICA

AT THE SECOND SESSION

Begun and held at the City of Washington on Thursday, the third day of January, one thousand nine hundred and eighty

AN ACT

To authorize the Secretary of the Interior to reimburse certain purchasers of subleases from, and creditors of, the Sangre de Cristo Development Company, Incorporated, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Secretary of the Interior is authorized to reimburse persons who are determined by the Secretary to be bona fide purchasers of subleases from the Sangre de Cristo Development Company, Incorporated (a corporation incorporated under the laws of the State of New Mexico), for subdivision lots on the Pueblo of Tesuque Indian Reservation near Santa Fe, New Mexico. The Secretary is authorized to reimburse such persons for the amounts they have expended in the acquisition of a sublease or subleases and upon receipt of such compensation such persons must relinquish all claims or rights, if any, they may have arising from their sublease.

(b) Applications for reimbursement under this Act shall be in such form and contain such information as the Secretary of the Interior, by regulation, shall prescribe. No application for reimbursement shall be considered by the Secretary unless it is submitted on or before the date

of expiration of the twenty-four-month period following the date of enactment of this Act.

(c) Subject to the availability of appropriations, the Secretary shall reimburse those applicants who are determined to be bona fide purchasers of subleases from the Sangre de Cristo Development Company, Incorporated, pursuant to its master lease with Tesuque Pueblo initially approved May 24, 1970, by the Bureau of Indian Affairs and subsequently disapproved on August 24, 1977. As used in this Act, the term "bona fide purchasers" shall mean anyone who purchased a sublease in an arm's-length transaction, for value and without notice.

(d) Within the one-hundred-and-eighty-day period following the date of the enactment of this Act, the Secretary of the Interior shall take such action as may be necessary to inform purchasers of such subleases from the Sangre de Cristo Development Company, Incorporated, of the fact that the Secretary of the Interior has authority to reimburse any such person determined by the Secretary to be a bona fide purchaser of such sublease for the amounts expended by such purchaser in the acquisition of such sublease. The Secretary shall further inform such purchasers that any application for reimbursement must be submitted on or before the date of expiration of the twenty-four-month period following the date of the enactment of this Act.

SEC. 2. (a) Subject to the availability of appropriations, the Secretary of the Interior shall reimburse bona fide creditors of the Sangre de Cristo Development Company, Incorporated, who shall have been certified as such by the United States District Court for the District of New Mexico, Bankruptcy Division, in the action entitled "Sangre de Cristo Development Company, Incorporated, No. 77-1044 in Bankruptcy", for the amount the court determines is owing to such creditors from such corporation. The United States shall have a right to intervene in such action as its interests may warrant in consideration

of the provisions of this section and shall have the rights of a party in interest under section 502 of title II, United States Code. No person or entity having or having had an equity interest in the Sangre de Cristo Development Company, Incorporated, shall be deemed to be a bona fide creditor of the corporation for purposes of this section.

(b) Any creditor, who has accepted a sublease from the corporation for subdivision lots in compensation for services or materials provided to the corporation and who is ohterwise a bona fide creditor under subsection (a) of this section, may be reimbursed pursuant to subsection (a) for the actual value of such services or materials upon certification by the court as provided in subsection (a) or upon proof satisfactory to the Secretary.

SEC. 3. Jurisdiction is hereby conferred on the United States District Court for the District of New Mexico to hear, determine, and render judgment on any legal claim for damages, under existing law, that the Sangre de Cristo Development Company, Incorporated, may have against the United States arising from the action of the United States in the initial approval and subsequent disapproval of the lease described in section 1(c) of this Act or from the preparation of the environmental impact statement attendant to such lease. Such action must be filed within one year from the date of enactment of this Act and jurisdiction conferred by this section includes jurisdiction of any setoff, counterclaim, or other claim or demand whatever on the part of the United States against such corporation.

SEC. 4. Effective October 1, 1981, there are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 1 and 2 of this Act.

/s/ Thomas P. O'Neil, Jr.
Speaker of the House of Representatives.

/s/ [Illegible]
President of the Senate pro tempore

[Approved Dec. 18, 1980]

/s/ Jimmy Carter

(2)

Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

No. 91-1286

In the Supreme Court of the United States

OCTOBER TERM, 1991

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner had a compensable property interest in a lease approved by the Secretary of the Interior pursuant to 25 U.S.C. 415 before the Secretary had complied with provisions of the National Environmental Policy Act.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 932 F.2d 891. The opinion of the district court (Pet. App. 14a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1991. A petition for rehearing was denied on September 24, 1991. Pet. App. 34a. On December 11, 1991, Justice White extended the time for filing a petition for a writ of certiorari to and including January 22, 1992 (Pet. App. 36a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A group of investors formed petitioner Sangre de Cristo Development Company, Inc. (Sangre), in 1968. Sangre intended to conclude a 99-year lease with the Tesuque Pueblo, a federally recognized Indian tribe, for land that the United States held in trust for the Pueblo. Under 25 U.S.C. 415(a), any such lease must be submitted to the Secretary of the Interior for approval. After several years of negotiations, Sangre and the Pueblo entered into a lease on April 17, 1970. Pet. App. 16a. The Area Supervisor of the Bureau of Indian Affairs approved the lease on May 2, 1970. *Ibid.* No effort was made to comply with the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, because the Department of the Interior took the position at that time that approvals of leases for Indian lands were not "major Federal actions" and thus were not subject to NEPA. See 42 U.S.C. 4332(2)(C).

Neighboring landowners and environmental groups sued the Secretary of the Interior and other officials to enjoin the issuance or approval of the lease, on the ground that the approval of the lease was a major federal action subject to the provisions of NEPA. The district court denied relief, but the court of appeals reversed. *Davis* v. *Morton*, 335 F. Supp. 1258 (D.N.M. 1971), rev'd, 469 F.2d 593 (10th Cir. 1972). The Tenth Circuit held that decisions to approve leases of Indian land constitute major federal actions subject to NEPA. 469 F.2d at 597. The plaintiffs in *Davis* v. *Morton* had "requested the court to issue a preliminary and permanent injunction enjoining [the federal parties] from approving, allowing or acting in any way on submissions or approvals required or permitted under the lease agreement until the environmental impact of the project had been studied and evaluated."

Id. at 595. Upon reversing the district court, the Tenth Circuit remanded "the case * * * to the trial court with directions to grant the relief prayed for." *Id.* at 598. The district court entered an injunction accordingly.

2. The Bureau of Indian Affairs (BIA) then began work on an environmental impact statement (EIS). As the draft EIS was circulating in the Interior Department, the ownership of Sangre changed. A new group of investors purchased the company in November 1973, aware of the fact that all development under the lease had been enjoined pending completion of the EIS. Pet. App. 18a. The draft and final EIS went through revision and approval, and the document eventually was issued on July 12, 1977. It identified several adverse consequences that would result from proceeding with the development as planned. The administration of the Pueblo had meanwhile changed, and the Pueblo formally requested the Secretary to withhold approval of the lease. *Id.* at 20a. On August 25, 1977, the Secretary announced, through his designee, that he would disapprove the lease, based on the environmental impact of the lease and the opposition of the Pueblo. Sangre did not challenge the Secretary's action as arbitrary or capricious under the Administrative Procedure Act, 5 U.S.C. 702.[1]

3. Petitioners did, however, sue the United States in the district court under a special jurisdictional statute, Act of Dec. 18, 1980, Pub. L. No. 96-549, § 3, 94 Stat. 3220 (reproduced at Pet. App. 44a-46a). In their complaint, petitioners alleged, *inter alia*, that the government took Sangre's property without just compensation when the Secretary declined to approve

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[1] Sangre was forced into involuntary bankruptcy on October 26, 1977. Pet. App. 4a. This action is being pursued by the trustee in bankruptcy.

the lease after the EIS was assembled and approved. The district court rejected petitioners' claim. It held that the Secretary's initial approval of the lease was invalid because the Secretary had not complied with NEPA before issuing it, and that therefore "the lease itself was either void or voidable." Pet. App. 32a. Either way, the court reasoned, Sangre had no vested rights in the lease, and the government was not liable to Sangre for the taking of any property under the Fifth Amendment. Pet. App. 32a.

4. The Tenth Circuit affirmed the district court's decision. The court of appeals agreed that the approval of the lease without complying with NEPA rendered the initial approval invalid. Pet. App. 6a. It explained that leases subject to 25 U.S.C. 415(a) require *valid* approval by the Secretary, and that the Secretary's failure to comply with NEPA rendered his purported approval invalid. Pet. App. 6a. Relying on *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947), and *Gray* v. *Johnson*, 395 F.2d 533 (10th Cir.), cert. denied, 392 U.S. 906 (1968), the court of appeals held that those who deal with the government assume the risk that the agents of the government might act improperly. Pet. App. 6a-7a. "The Department's August 25, 1977 action, regardless of whether it is referred to as a recision or merely a failure to approve, did not divest Sangre of a leasehold interest because Sangre's interest never vested in the first place." *Id.* at 7a.

ARGUMENT

A party claiming that its property was taken must initially show that it had a property interest protected by the Fifth Amendment. Petitioners do not dispute that, under 25 U.S.C. 415(a), they could not obtain a property interest in the lease unless and

until it received secretarial approval.[2] Petitioners claim, however, that the Secretary's action in purporting to approve the lease in 1970, even without having complied with NEPA, constituted the approval necessary to vest petitioners with a property interest in the lease.

Petitioners' argument is mistaken. The Secretary was required to comply with NEPA in 1970 when he purported to approve the lease. That was the precise holding of the Tenth Circuit in *Davis* v. *Morton*, and petitioners do not now argue that that holding was incorrect.[3] It is well settled that a party cannot obtain a vested property interest by relying on the actions of a government agent acting contrary to law or regulation. See, *e.g.*, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) ("anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority"); *Utah Power & Light Co.* v.

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[2] See, *e.g.*, *Quantum Exploration, Inc.* v. *Clark*, 780 F.2d 1457, 1459-1460 (9th Cir. 1986) (tribe can rescind agreement prior to secretarial approval under 25 U.S.C. 2102); *Wisconsin Winnebago Business Comm.* v. *Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985) (contract without secretarial approval under 25 U.S.C. 81 null and void); *Lawrence* v. *United States*, 381 F.2d 989, 990 (9th Cir. 1967) (contract without secretarial approval void); cf. *Yavapai-Prescott Indian Tribe* v. *Watt*, 707 F.2d 1072, 1074-1075 (9th Cir.) (Secretary must approve termination of lease), cert. denied, 464 U.S. 1017 (1983).

[3] Any doubt about the need for preparation of an EIS in cases like the present was obviated by a 1970 amendment to 25 U.S.C. 415(a), which provided that the Secretary, prior to approving any lease for Indian lands, must "first satisfy himself that adequate consideration has been given to * * * the effect on the environment of the uses to which the leased lands will be subject." 25 U.S.C. 415(a). See Act of June 2, 1970, Pub. L. No. 91-275, § 2, 84 Stat. 303.

United States, 243 U.S. 389, 409 (1917) ("the United States is neither bound nor estopped by the acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit"); *Gray* v. *Johnson*, 395 F.2d 533, 537 (10th Cir.), cert. denied, 392 U.S. 906 (1968). Although this Court has on occasion questioned whether the government might be bound in some cases of affirmative misconduct, see *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2470 (1990) (citing cases), no such misconduct on the part of the Secretary at the time he purported to approve the lease has been alleged in this case. Rather, as the court of appeals explained, the court in *Davis* "agreed * * * that the Department was 'without authority to grant the lease since no environmental impact study was conducted prior to approval of the lease as required by NEPA.'" Pet. App. 7a (quoting *Davis*, 469 F.2d at 594). Accordingly, this case is squarely governed by long-established principles under which the Secretary's 1970 action in purporting to approve the lease, in violation of NEPA, failed to vest petitioners with a property right in that lease.

Petitioners argue that, although some actions taken by a government official contrary to law or regulation are invalid, the Secretary's action in this case—his purported approval of the lease in 1970—should not be held to fall within that category. See Pet. 18-19. According to petitioners, the Secretary's failure to comply with NEPA merely resulted in the imposition of a requirement that he prepare a post-approval EIS and then ratify his prior approval of the lease, regardless of the environmental effects of the project that are identified in the EIS.

The regime envisioned by petitioners would be a strange one, in which an agency is required to pre-

pare an EIS, but is forbidden from acting on the information disclosed by the EIS. The primary function of NEPA is to "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); see also *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980) (per curiam) (court must "insure that the agency has considered the environmental consequences"); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (NEPA requires agencies to take a " 'hard look' at environmental consequences").[4] Petitioners' suggestion—that the Secretary was required to prepare an EIS and then simply shelve it because the decision to approve the lease had already been made—would render NEPA's requirements entirely futile.

Petitioners further argue that a violation of NEPA does "not automatically result in injunctive relief." Pet. 15.[5] That fact, however, is irrelevant here, for the

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[4] Petitioners believe it significant that NEPA does not "dictate or control agency decisions." Pet. 15. That fact, however, does not support any of petitioners' arguments. Although NEPA does not determine substantive agency decisions, NEPA does require that decisionmakers consider environmental consequences identified in an EIS before taking major federal actions.

[5] Petitioners also argue that NEPA "need not be complied with when agency action is mandatory rather than discretionary." Pet. 15. But the Secretary's 1970 approval of the lease was plainly discretionary—a fact that petitioners do not dispute. In any event, the Tenth Circuit's decision in *Davis* v. *Morton* establishes that, whatever may be the case with respect to the need to comply with NEPA in other cases, the Secretary was required to do so before approving the lease involved here.

question in this case does not concern whether an injunction is warranted to remedy a particular NEPA violation. The NEPA violation involved here occurred in 1970. The question whether an injunction should have been entered to remedy that violation was resolved in 1972 by *Davis* v. *Morton*, which held that the injunctive relief sought by the plaintiffs in that case was warranted.[6] The issue here is whether the Secretary's purported approval of the lease in 1970, in violation of NEPA, was valid. The Tenth Circuit's decision in *Davis* v. *Morton*, as reaffirmed in this case, that it was not valid does not conflict with the decision of any other court and does not warrant further review.

Finally, petitioners argue (Pet. 20-22) that the Tenth Circuit misread its own decision in *Davis* v. *Morton* when it concluded that *Davis* had "held that the initial approval of the lease by the Department was invalid because it was not preceded by the requisite environmental study." Pet. App. 6a. Further review would not be warranted to determine whether the Tenth Circuit accurately read its own prior opinions. And, in any event, the Tenth Circuit's reading of *Davis* was correct.[7] The only possible purpose of

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[6] The plaintiffs in *Davis* sought to "enjoin[] [the Secretary] from approving or acting on any submissions or approvals under the lease." 469 F.2d at 598. The court of appeals remanded the case to the trial court "with directions to grant the relief prayed for." *Ibid.*

[7] Petitioners contend (Pet. 16-17) that the Tenth Circuit, in a case decided after *Davis* but before the Secretary determined in 1977 not to approve the lease, held that the lease was not void. See *Tewa Tesuque* v. *Morton*, 498 F.2d 240 (1974), cert. denied, 420 U.S. 962 (1975). *Tewa Tesuque* involved an attempt by a faction of the Tesuque Pueblo to overturn the Secretary's approval of the lease. The court's statement that *Davis* "did not * * * result in cancellation of the lease," 498 F.2d at 243,

requiring preparation of an EIS in *Davis* was to prompt a reconsideration of the Secretary's approval in light of the information disclosed in the EIS. To be sure, nothing in NEPA required the Secretary to revoke his prior approval after considering the EIS. But, as explained above, the result reached in *Davis* is inexplicable if it required that an EIS be prepared and then entirely disregarded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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was made in the context of a ruling that, after *Davis*, the Pueblo may have retained an interest in the lease sufficient to make it an indispensable party to the case. Far from holding that the Secretary's failure to prepare an EIS had no effect on the lease's validity, the Tenth Circuit in *Tewa Tesuque* simply recognized that the ultimate validity of the lease remained an open question until the Secretary, after preparing and reviewing an EIS, determined whether to approve the lease. That question was answered when, in 1977, the Secretary decided not to approve it. Cf. Pet. App. 32a (after *Davis*, "the lease itself was either void or voidable").